Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–985 OF 1991(1)
SYED AHMAD HELMY JC
19 JULY 2001

Civil Procedure *— Injunction — Setting aside ex parte injunction — Non-disclosure of material facts — Previous order prevented plaintiff from injunctive relief — Balance of convenience — Failure to give notice of intention to proceed before moving for ex parte injunction, whether mere irregularity — Duplicity of proceedings, whether abuse of process*

The first and second plaintiffs made an application for the continuination of an ex parte injunction order restraining the first defendant, who was the managing director of the third plaintiff, from dealing in any manner the assets and funds held by Towry Law Asset Management Sdn Bhd. The first defendant applied to set aside the ex parte order on the following grounds: (i) the failure of the plaintiffs to disclose the restraining order where the plaintiffs were restrained from interfering with the management and affairs of the third plaintiff company; (ii) the plaintiffs had failed to comply with O 3 r 6 of the Rules of the High Court 1980 for failing to give notice of intention to proceed before moving for the ex parte injunction; (iii) there was an abuse of process when the plaintiffs ignored the undertaking given through a consent order and initiated multiple proceedings involving the same funds; (iv) the principles of res judicata prevented the plaintiffs from making and obtaining injunctive order as they had earlier made final orders on the issue of whether or not the plaintiffs have any say in management matter of the third plaintiff; and (v) the plaintiffs had no locus as director of the third plaintiff to claim interest in the assets of the company.

Held, dismissing the plaintiffs' application:

(1) The non-disclosure amounted to a material non-disclosure as it withheld vital information relating to the question of capacity or locus for the court to evaluate at the ex parte stage. It was not sufficient for the plaintiffs to make references to previous court actions without highlighting its effect. The plaintiffs' duty was to disclose all available information for the court's determination on whether it ought to exercise its discretionary powers (see pp 428A–B).

(2) The court had an overriding discretion whether or not to set aside an ex parte order obtained without due disclosure but it must be founded on judicial principles which necessitates the court to evaluate the materiality and importance of the non-

disclosure. Further, O 29 r 1(2B) of the Rules of the High Court 1980 has fettered the court's discretion. Since the plaintiffs had failed to make a full and frank disclosure at the ex parte stage they had breached the provisions of O 29 r 1(2B) and the court was justified in setting aside the injunctive order (see pp 430E–F, 431A-B, 432E).

(3) There has been a lapse of more than one year since the last proceeding in this action and accordingly the plaintiffs were obliged to give notice of intention to proceed before moving for the ex parte injunction. Since the requirement of O 3 r 6 of the RHC is mandatory, failure to comply warrants a setting aside or striking off of the action. There was no plausible reason for the plaintiffs not to comply with the requirements of O 3 r 6 of the RHC and hence the court was justified in concluding that a breach of same in the factual matrix of this case could not be termed a mere technical non compliance of procedural rules amounting to an irregularity (see pp 433F–G, 435A).

(4) The conduct of the plaintiffs in instituting several proceedings in respect of the same subject matter was an abuse of process and therefore the interlocutory injunction could not be allowed to stand (see p 436B–C).

(5) The order of the Court of Appeal that the first plaintiff in her capacity as beneficiary of the estate and/or as director of the third plaintiff had no capacity to interfere in matters concerning the management of the third plaintiff and the earlier court order refusing to restrain the first defendant from managing the assets of the third plaintiff had adjudicated and disposed of with finality the issue of whether or not the plaintiffs have any say in management matters of the third plaintiff. By reason of the previous court orders which were still valid and subsisting, the plaintiffs' incapacity was self evident to prevent the plaintiffs from the injunctive relief (see pp 437F–H, 439H).

(6) There were no serious questions to be tried and the injunction ought to be set aside. Further, the balance of convenience and justice were in the defendant's favour. There was also no evidence that the defendants were not able to meet any claim for damages (see p 440C–D, G).

[Bahasa Malaysia summary

Plaintif-plaintif pertama dan kedua telah membuat satu permohonan untuk meneruskan satu perintah injunksi ex parte menyekat defendan pertama, pengarah urusan plaintif ketiga, daripada berurusan dalam apa-apa cara aset-aset dan wang yang dipegang oleh Towry Law Asset Management Sdn Bhd. Defendan pertama memohon untuk mengetepikan perintah ex parte tersebut berdasarkan alasan-alasan berikut: (i) kegagalan plaintif-plaintif untuk mendedahkan perintah

sekatan di mana plaintif-plaintif telah disekat daripada campur tangan dalam pengendalian dan pengurusan syarikat plaintif ketiga; (ii) plaintif-plaintif telah gagal untuk mematuhi A 3 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana gagal untuk memberikan notis niat untuk meneruskan prosiding sebelum memohon injunksi ex parte; (iii) terdapat penyalahgunaan proses apabila plaintif-plaintif tidak menghiraukan akuan sumpah yang diberikan melalui satu perintah persetujuan dan menyebabkan prosiding yang berganda yang melibatkan wang yang sama; (iv) prinsip-prinsip res judicata menyekat plaintif-plaintif daripada membuat dan mendapat perintah injunksi kerana mereka telah terlebih dahuku membuat perintah-perintah muktamad tentang persoalan sama ada atau tidak plaintif-plaintif mempunyai hak bersuara dalam perkara pengurusan plaintif ketiga; dan (v) plaintif-plaintif tidak mempunyai locus sebagai pengarah plaintif ketiga untuk menuntut kepentingan dalam aset-aset syarikat tersebut.

Diputuskan, menolak permohonan plaintif-plaintif:

(1) Ketakdedahan tersebut menjadi satu ketakdedahan yang material kerana ia menyimpan maklumat yang penting berhubung persoalan kemampuan dan locus untuk mahkamah menilai di peringkat ex parte. Adalah tidak mencukupi untuk plaintif-plaintif membuat rujukan kepada tindakan mahkamah sebelumnya tanpa menekankan akibatnya. Tugas plaintif adalah untuk mendedahkan semua maklumat yang ada untuk penentuan mahkamah sama ada ia patut menggunakan kuasa budi bicaranya (lihat ms 428A–B).

(2) Mahkamah mempunyai budi bicara utama sama ada atau tidak untuk mengetepikan satu perintah ex parte yang diperolehi tanpa pendedahan sewajarnya tetapi ia mesti berdasarkan prinsip-prinsip kehakiman yang memerlukan mahkamah untuk menilai kepentingan ketakdedahan. Tambahan pula, A 29 k 1(2B) KMT telah membelenggui budi bicara mahkamah. Memandangkan plaintif-plaintif telah gagal untuk membuat pendedahan yang penuh dan terus-terang di peringkat ex parte mereka telah melanggar peruntukan-peruntukan A 29 k 1(2B) KMT dan mahkamah adalah adil dalam mengetepikan perintah injunksi tersebut (lihat ms 430E–F, 431A–B, 432E).

(3) Wujud kelewatan selama lebih setahun sejak prosiding terakhir dalam tindakan ini dan sewajarnya plaintif-plaintif dikehendaki memberikan notis niat untuk meneruskan sebelum memulakan injunksi ex parte tersebut. Memandangkan keperluan A 3 k 6 KMT adalah mandatori, kegagalan untuk mematuhi mewarankan satu penepian atau pembatalan tindakan tersebut. Tiada sebab yang munasabah untuk plaintif-plaintif tidak mematuhi keperluan A 3 k 6 KMT dan oleh itu mahkamah adalah adil dalam memutuskan bahawa satu pelanggaran yang sama dalam faktual

matrix kes ini tidak boleh ditermakan semata-mata sebagai satu ketidakpatuhan teknikal tentang kaedah-kaedah prosedur yang membentuk satu luar aturan (lihat ms 433F–G, 435A).

(4) Perbuatan plaintif-plaintif memulakan beberapa prosiding berhubung perkara pokok yang sama adalah satu penyalahgunaan proses dan oleh itu injunksi interlokutori tidak boleh dibenarkan kekal (lihat ms 436B–C).

(5) Perintah Mahkamah Rayuan bahawa plaintif pertama dalam keupayaan sebagai benefisiari harta pusaka dan/atau sebagai pengarah plaintif ketiga tidak mempunyai keupayaan untuk campur tangan dalam urusan-urusan mengenai pengendalian plaintif ketiga dan perintah mahkamah terdahulu yang enggan menyekat defendan pertama daripada menguruskan aset-aset plaintif ketiga telahpun memberikan penghukuman dan menyelesaikan dengan muktamad persoalan sama ada atau tidak plaintif-plaintif mempunyai hak bersuara dalam pengendalian urusan-urusan plaintif ketiga. Berdasarkan sebab perintah-perintah mahkamah terdahulu tersebut yang masih sah dan berkuatkuasa, ketidaupayaan plaintif-plaintif dengan sendiri menerangkan agar menyekat plaintif-plaintif daripada relif injunksi (lihat ms 437F–H, 439H).

(6) Tiada persoalan-persoalan yang serius yang perlu dibicarakan dan injunksi tersebut hendaklah diketepikan. Tambahan pula, imbangan kemudahan (balance of convenience) dan keadilan adalah menyebelahi defendan. Begitu juga tiada keterangan bahawa defendan-defendan tidak mampu untuk membayar apa-apa tuntutan ganti rugi (lihat ms 440C–D, G).]

Notes

For cases on setting aside of injunction, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2989–2996.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Attorney General v Parson [1956] AC 421 (refd)

Bakmawar Sdn Bhd v Malayan Banking Bhd [1992] 1 MLJ 67 (refd)

Belmont Finance Corp v William Furniture Ltd & Ors (No 2) [1980] 1 All ER 393 (refd)

Brink's Mat Ltd v Elcomber & Ors [1988] 1 WLR 1350 (refd)

Carl Zeiss Stifling v Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536 (refd)

Castle Fitness Consultancy Pte Ltd v Manz [1990] 1 MLJ 141 (refd)

China Insurance Co Ltd v Yeong Ah Lam & Anor [1973] 2 MLJ 185 (refd)

City Equitable Fire Insurance Co Ltd, Re [1925] Ch 407 (refd)

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (refd)
Datuk Abu Mansor bin Mohamed Nasir v Bank Kerjasama Rakyat Malaysia Bhd & Anor [1982] 1 MLJ 258 (refd)
Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189 (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (refd)
JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor [1987] 1 MLJ 312 (refd)
Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors [1999] 4 CLJ 726 (refd)
Lai Yoke Ngan v Chin Teck Kwee [1997] 2 MLJ 565 (refd)
Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (refd)
Lim Oh & Ors v Allen & Gledhill [1998] 4 MLJ 645 (refd)
Mayhew v Free Grammar School of John Lyon The Times, 11 June 1991 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Schlieske v Minister for Immigration & Ethnic Affairs (*G 324 of 1987*) *Schilieske v Robilliard* (*G361 of 1987*) (1988) 79 ALR 554 (refd)
Shell Chemicals UK v Vinamul (formerly Vinyl Products) (1991) 135 SJ 412 (refd)
Siporex Trade SA v Comdel Commodities Ltd [1986] Lloyd's Rep 428 (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487 (refd)
Tenaga Nasional Bhd v Prorak Sdn Bhd [2000] 1 MLJ 479 (refd)
Tunas Pte Ltd v Mayer Investment Pte Ltd [1989] 2 MLJ 132 (refd)
Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 (refd)

Legislation referred to

Housing Act 1974) cl 44, Sch 8, para 2(3)
Rules of the High Court 1980 O 3 r 6, O 29 r 1(2B)
Rules of the Supreme Court 1957 [UK] O 18 r 8(1), O 64 r 13

David Morais (*Khabir Dhillon* with him) (*M David Morais*) for the first plaintiff.
Danaraj (*Mathews George* with him) (*Danaraj Mathews Jimmy & Sara*) for the second plaintiff.
RR Mahendran (*RR Mahendran & Co*) for the first defendant.
Steven Thiru (*Shook Lin & Bok*) for the second defendant.

Syed Ahmad Helmy JC:. There are two applications before this court in respect of the aforesaid action — namely encl 14, which is the first, and second plaintiffs' application on an inter parte basis for the continuation of

the ex parte injunction order dated 25 October 2000, as varied by the Order dated 25 October 2000, and encl 24, which is the first defendant's application to set aside the ex parte order dated 17 October 2000, as varied by the Order dated 25 October 2000 aforesaid.

The ex parte injunction granted by the court on 17 October 2000 and varied on 25 October 2000 was essentially to restrain the first defendant, who is the managing director of the third plaintiff from dealing in any manner the assets and funds held by Towry Law Asset Management Sdn Bhd estimated at US$3m.

The application herein is another episode of the continuing and rather tragic saga of protracted and acrimonious family dispute over the real and personal properties of the late Kontilal Prabhulal Doshi, also known as KP Doshi.

The originating summons herein relates to the seeking of declaratory reliefs by the first and second plaintiffs that they are the rightful directors of the third plaintiff, and is part of a series of several legal suits involving the first and second plaintiffs herein on one side, and the first defendant herein on the opposing side. Amongst the other related actions are:

1 JB Civil Suit No 22–69–1991

Suit by the first defendant against the second plaintiff and Jogesh (youngest son of the first plaintiff) for a declaration that he is the true and legal beneficial owner of the shares registered in his name with the third plaintiff, and injunctive reliefs obtained for the surrenders of the keys to third plaintiff's premises, and documents relating to its affairs, and restraining second plaintiff and Jogesh from holding themselves out as directors and intemeddling with affairs of company.

2 JB Civil Suit No 22–195–1991

Suit by first plaintiff and Jogesh, as plaintiffs, against the first and second defendants and third plaintiff as defendants. Action by first plaintiff and Jogesh in their capacity as executor and executrix challenging the first and second defendants' appointment as directors of the third plaintiff, and a declaration that the shares in the first defendant's name in third plaintiff be held in trust for the benefit of the estate.

3 3 JB High Court OS 24–1066–1991

Suit by first plaintiff and Jogesh, as executors, against the first defendant in respect of first defendant's dealings with the assets of Tino Industries which was a partnership between first defendant and the late Doshi.

4 4 SP 72 of 1993

Whereby first plaintiff was under a restraining order dated 3 February 1993 from interfering in the management and affairs of third plaintiff company, including its assets.

5 Originating Motion No 25–32–1994 in JB High Court

Application by first and second defendant together with third plaintiff for the removal of the first plaintiff and Jogesh as executors and executrix, and High Court granted the order for removal on 29 July 1995, and the appeal was dismissed by Court of Appeal on 11 August 1998 and Amanah Raya Bhd substituted as administrators.

6 On 25 November 1997, OS 22–1141–1997 was filed in JB High Court by first defendant in the name of the third plaintiff against Towry Law Asset Management Sdn Bhd (formerly known as Matheson PFC Asset Management Sdn Bhd) praying for the release of the investment funds with Towry Law. The first plaintiff and Jogesh applied to intervene in their capacity as executors and beneficiaries, which was allowed by the court on 28 February 1998. However, the decision was reversed by the Court of Appeal on 27 September 2000 on the grounds that since both have been removed as executors, as beneficiaries of an unascertained residuary estate, they do not have legal interest and have no locus to intervene.

7 SP 1189 of 1997

Plaintiff and Jogesh sought an order preventing Towry Law from releasing funds.

8 On 21 October 1998, another action based on negligence against Towry Law was filed in KL High Court 22–3763–1998 by the first defendant in the name of third plaintiff, requesting a release of the investment funds. The first plaintiff and Jogesh applied to intervene, and pending the order for intervention, a consent order was entered on 30 November 1998 whereupon the investment fund was liquidated into US Dollars, to be placed in an interest bearing account in Towry Law's name. The court allowed the intervention on 24 May 2000 in their capacity as beneficiaries and the appeal has yet to be heard.

It is to be observed that as the parties intended to facilitate early disposal of the various suits in the Johor Bahru Courts, they accordingly recorded a consent order in Suit 195, setting it down for trial, and that suit 169 and OS 985 will abide by the decision in Suit 195.

In the course of my judgment herein, I shall invariably advert to some of the related actions aforesaid which have direct relevance to the issues raised herein and which are the basis of my reasoning in the judgment herein.

The undisputed facts herein are that the first and second plaintiffs and the first defendant are all members of the Doshi family — the first plaintiff is the mother and the second plaintiff and the first defendant are her sons, whilst the second defendant is the wife of the first defendant and hence the daughter in law of the first plaintiff. The third plaintiff is one of the companies of the late Doshi and the first defendant is the managing director, who together with two other nominees, make up the board of directors of the third plaintiff.

The subject matter of the injunction herein, namely the US$3m which is currently held by Towry Law, is the most liquid asset of the third plaintiff company.

The defendants' opposition to the plaintiffs' application for injunction can be broadly categorized under four headings.

Material non-disclosure

The main ground relied upon by the defendant under this head was the failure by the plaintiff to disclose the restraining order dated 3 February 1993 made in Saman Pemula No 72 of 1993, where the plaintiffs were restrained from interfering with the management and affairs of the third plaintiff company, and by extension it is contended, includes the assets and funds of the third plaintiff company. A similar restraining order was also obtained against the second plaintiff on 14 July 1992 in Suit No 22–169–1991. The two orders aforesaid exhibited in JKD1 and JKD3 of encl 23 are reproduced hereunder:

JKD1

IN THE HIGH COURT OF MALAYA AT JOHOR BAHRU
IN THE STATE OF JOHOR, MALAYSIA
ORIGINATING SUMMONS NO 72 OF 1993

In the matter of Overseas Industries Sdn Bhd and Tino Industries Sdn Bhd

1 SHOBHANA JIGARLAL DOSHI
2 JIGARLAL KANTILAL DOSHI
3 OVERSEAS INDUSTRIES SDN BHD
4 TINO INDUSTRIES SDN BHD ...PLAINTIFFS

AND

1 DAMAYANTI KANTILAL DOSHI
2 VALLIVEL A/ L RONNAM
3 KALU NAIR ...DEFENDANTS

BEFORE THE HONOURABLE MR JUSTICE HAIDAR BIN MOHD NOOR, HIGH COURT OF MALAYA, IN CHAMBERS, JOHOR BAHRU, JOHOR THIS 3RD DAY OF FEBRUARY 1993

ORDER

UPON the application on the part of the abovenamed plaintiffs by way of summons in shambers dated the third day of February 1993 coming on for hearing the third day of February 1993 in the presence of Mr Kuthubul Zaman Bukhari of counsel for the plaintiffs AND UPON READING the summons in chambers with the affidavit of Shobhana J Doshi dated the third day of February and UPON HEARING the counsel for the plaintiffs as aforesaid and by the said undertaking to abide by any order the court of judge my make as to damages in case the court or a judge should hereafter

be of opinion that the defendants shall have sustained by any reason of this order which the plaintiff ought to pay IT IS HEREBY ORDERED as follows:

(a) That the first, second and third defendants be restrained whether by themselves or their servants or agents or otherwise howsoever from remaining in the premises and continuing to occupy the premises of the third plaintiff, Overseas Industries Sdn Bhd and the fourth plaintiff, Tino Industries Sdn Bhd.

(b) That the first plaintiff be allowed to enter the premises of No 9, Jalan Tara, Tampoi, Johor and continue in the management and operation of the third and fourth plaintiff companies.

(c) That the first, second and third defendants be restrained whether by themselves of their servants or agents from removing any books, documents and files from the premises of No 9, Jalan Tara, Tampoi, Johor Bahru.

(d) That the second and third defendants be restrained whether by themselves or their servants or agents or otherwise howsoever from acting or holding themselves, as Executive Officer or Assistant Executive Officer of the third plaintiff, Overseas Industries Sdn Bhd.

(e) That the first, second and third defendants or their servants or agents do deliver forthwith all books, files and documents taken out from the premises of Overseas Industries Sdn Bhd and Tino Industries Sdn Bhd.

(f) That the first, second and third defendants remove all guards from the premises, No 9, Jalan Tara, Tampoi, Johor Bahru and allow the plaintiffs, their servants and agents access to the said premises.

(g) That the first, second and third defendants be restrained whether by themselves or their servants or agents or otherwise howsoever from managing the affairs of third plaintiff, Overseas Industries Sdn Bhd and fourth plaintiff, Tino Industries Sdn Bhd, entering into commitments, contracts, arrangements of any nature whatsoever, dealing with any of the bank accounts, faced deposit accounts, investment accounts or any assets of third plaintiff, Overseas Industries Sdn Bhd and fourth plaintiff, Tino Industries Sdn Bhd, moveable or immovable or of whatsoever nature of the third and fourth plaintiff companies, until further order.

And it is lastly ordered that the defendants are at liberty to set aside the above orders within fourteen days from the date of service of this order.
Dated this third day of February 1993.

.....
Senior Assistant Registrar
High Court of Malaya
Johor Bahru

This order is filed by Messrs Zaman & Associates of Suite 502, 5th Floor, Merlin Tower, Jalan Meldrum, 80000 Johor Bahru

JKD3

DALAM MAHKAMAH TINGGI MALAYA AT JOHOR BAHRU
DALAM NEGERI JOHOR, MALAYSIA
GUAMAN SIBIL NO 22–169 TAHUN 1991

ANTARA

JIGARLAL KANTILAL DOSHI ...PLAINTIF

DAN

1 JOGESH KANTILAL DOSHI
2 TIKAKLAL KANTILAL DOSHI ...DEFENDAN

DI HADAPAN YANG ARIF, DATUK LC VOHRAH
DALAM KAMAR
HAKIM, MAHKAMAH TINGGI MALAYA
JOHOR BAHRU, JOHOR
PADA 14 HARIBULAN JULAI 1991

PERINTAH

Atas permohonan bagi pihak plaintif melalui saman dalam kamar Catatan No 632/91 bertarikh 14 Julai 1991 yang telah didengar pada hari ini di dalam kehadiran En Kuthubul Zaman Bukahri, peguam bagi plaintiff dan setelah membaca saman dalam kamar serta afidavit En Jigarlal Kantilal Doshi yang diperakui pada 12 Julai 1991 dan difailkan pada 14 Julai 1991 dan setelah mendengar peguam bagi plaintif dan plaintif oleh peguamnya yang tersebut mengakui untuk mematuhi dengan apa-apa perintah yang dibuat oleh mahkamah atau hakim tentang gantirugi kiranya mahkamah atau hakim berpendapat selepas itu yang defendan-defendan telah ditanggungi apa-apa disebabkan perintah ini yang plaintif patut bayar, adalah diperintahkan dan diarahkan bahawa defendan pertama dan kedua hendaklah membuat penyerahan serta-merta kepada plaintif kunci-kunci premis kilang iaitu No 9, Jalan Tara, Tampoi, Johor Bahru berserta kesemua kunci-kunci peti-peti berkunci, kabinet dan bilik kawalan ketat, dan kesemua dokumen-dokumen buku-buku cek, penyata-penyata bank, harta benda syarikat, iaitu Overseas Industries Sdn Bhd berikutan penyerahan perintah ini diperintahkan selanjutnya bahawa defendan pertama dan kedua dihalang sama ada atas diri mereka masing-masing atau penggaji-penggaji atau ejen-ejen atau sebagaimana jua dan bertindak atau menggapi diri mereka sebagai Pengarah-Pengarah atau Pengurus-Pengurus atau Setiausaha-Setiausaha atau Pegawa-Pegawai syarikat iaitu Overseas Industries Sdn Bhd sehingga perbicaraan tindakan ini atau sehingga perintah lanjut diperintahkan selanjutnya bahawa defendan pertama dan kedua dihalang sama ada atas diri mereka masing-masing atau penggaji mereka atau ejen-ejen atau sebagaimana jua dan berurus campur dalam perniagaan atau pengurusan urusan-urusan syarikat iaitu Overseas Industries Sdn Bhd sehingga perbicaraan tindakan guaman ini atau sehingga perintah lanjut dan diperintahkan akhirnya bahawa defendan pertama dan kedua diberi kebebasan untuk memohon untuk menepikan perintah ini dalam tempoh 14 hari dari tarikh penerimaan perintah ini.

Bertarikh pada 14 haribulan Julai 1991.

.....
Penolong Kanan Pendaftar
Mahkamah Tinggi, Malaya
Johor Bahru

It is the defendant's submission that the cumulative effect of the non-disclosure of the two orders aforesaid amounts to material non-disclosure in that it goes to the root of the first and second plaintiffs' capacity to proceed with the injunctive application and the orders remain valid and binding as they have not been varied or set aside. In support of their contention, the defendants relied on *Tunas Pte Ltd v Mayer Investment Pte Ltd* [1989] 2 MLJ 132 and *Siporex Trade SA v Comdel Commodities Ltd* [1986] Lloyd's Rep 428.

The plaintiff disputes that there was non-disclosure and submits that all relevant disclosures have been made by the plaintiffs in their affidavit in support for ex parte injunctive relief in encl 13, particularly in paras 5, 6, 7 and 8 thereof. The plaintiffs further submit that even if there was non-disclosure, it was not material, bearing in mind that the first plaintiff is moving the court in her capacity as a director in which capacity there has not been any impediment of any restraining orders in any of the previous suits disclosed or otherwise. The plaintiff strenuously submits that what matters most, even if material non-disclosure existed, is the consequence of non-disclosure as there was no absolute right to set aside an ex parte order obtained by non-disclosure — the discretion is still with the court founded on the test of justice, and in support thereof relies on the case of *Brink's Mat Ltd v Elcomber & Ors* [1988] 1 WLR 1350 and *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487.

In reply, the defendants submit that in the light of the introduction of O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC') the rationale in *Brink's Mat*'s case is no longer relevant in an ex parte situation. The defendant reiterates and alludes to the case of *Siporex Trade SA v Comdel Commodities Ltd* in that once there is non-disclosure, the injunction cannot be granted and/or sustained even if there are serious questions to be tried.

On the first plaintiff's contention that she is moving the court in her capacity as a director, the defendant in relying on the case of *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 countered that a director having no interest in the assets cannot have the capacity to move the court for a restraining order.

In determining the non-disclosure issue, it is imperative to emphasize that the determinor of what is material for disclosure is the court and not the parties. Turning to the evidence in this case, I have scrutinized the affidavits filed by the first plaintiff and nowhere was there any disclosure of Saman Pemula No 72 of 1993, and particularly the restraining order dated 3 February 1993 restraining the first plaintiff from interfering with the affairs of the third plaintiff prior to the application for injunction. The first plaintiff only disclosed the order in her second affidavit of 24 October 2000 in encl 24 which was after the defendants' application to set aside the order. As regards Suit No 22–169–1991, though disclosure was made by the first plaintiff in her affidavit in encl 13, nevertheless the first and second plaintiffs failed to direct the court's attention to the scope and effect of the order dated 14 July 1992 made therein, particularly the restraining order restraining the second plaintiff from interfering with the management of the

third plaintiff. Again, in respect of the order dated 17 August 1991 made in JB High Court Civil Suit No 22–195–1991, and exhibited as DKD2A in encl 13, the plaintiff failed to draw the court's attention to the effect of the order.

It is my considered view that the non-disclosure or lack of disclosure as such amounts to a material non-disclosure, as it withheld vital information relating to the question of capacity or locus for the court to evaluate at the ex parte stage. It is not sufficient for the plaintiffs to make fleeting references to previous court actions without highlighting its effect. The plaintiffs' duty is to disclose all available information for the court's determination on whether it ought to exercise its discretionary powers. As was stated by her Ladyship Siti Norma Yaakob J (as she then was) in *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1992] 1 MLJ 67 at p 72:

> It is true that the defendant's letter was exhibited to the plaintiff's ex parte application but *it is incumbent upon the plaintiff on an ex parte application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made*. Had my attention been drawn to the fact that the second limb of the interim injunction was no longer necessary as the Biro had already been informed of the plaintiffs account, I would not have granted the order. (Emphasis added.)

In *Bakmawar*'s case, her Ladyship discharged the ex parte injunction on the ground that the court's attention was not drawn to a material fact, even though evidence of that fact was disclosed in the annexture to the affidavit.

Earlier, in the case of *Castle Fitness Consultancy Pte Ltd v Manz* [1990] 1 MLJ 141, the court stated that where an ex parte application is made, the plaintiff is not only obliged not to mislead the court, but in addition, he is under a duty to disclose to the court all matters that are within *his knowledge which are material to the proceedings and which are or may be in favour of an absent party. A matter is regarded as material if it is a factor that the court will take into account in the exercise of its discretion*. (Emphasis added.)

Having established that there are material non-disclosures on the part of the plaintiffs herein, I shall now proceed to address the plaintiffs' argument that the court is endowed with discretion to rule otherwise if justice dictates, as the emphasis should be on the consequence of non-disclosure rather than the non-disclosure itself. On the question of the court's discretion, it is necessary to ascertain the principles established on *Brinks Mat*'s case and *Tan Guan Eng*'s case cited by the plaintiffs.

In *Brink's Mat*'s case, the English Court of Appeal held that the court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. Ralph Gibson LJ, at pp 1356–1357, laid down the principles to be applied in determining non-disclosure:

In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following: (i) the duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1997] 1 KB 486 at p 514, per Scrutton LJ; (ii) the material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not be the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs*' case [1917] 1 KB 486 at p 504, per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* [1850] 2 Mac & G 231 at p 238, 42 ER 89 at p 92, and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at p 295 per Browne-Wilkinson J; (iii) the applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries; (iv) the extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including: (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant: sew, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338, [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour* [1985] FSR 87 at pp 92–93 per Slade LJ; (v) if material non-disclosure is established, the court will be 'astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ...': see *Bank Mellat v Nikpour* (at 9I) per Donaldson LJ, citing Warrington LJ in the *Kessington Income Tax Comrs'* case; (vi) whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented; (vii) finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v Nikpour* [1985] FSR 87 at p 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> '... when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if and injunction could properly be granted even had the farts been disclosed. (See *Lloyds Bow-maker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178 at p 183 per Glidewell LJ).'

Again, in the case of *Tan Guan Eng*'s case, the High Court exercised its discretion not to set aside the ex parte injunction even though there was

non-disclosure. His Lordship Edgar Joseph Jr J (as his Lordship then was) stated at p 497:

> I would add that even had I been made aware of the receipt by the first plaintiff on 3 March 1990 of a formal notice of the intended meeting of Dragon's board on 6 March 1990, I would still have granted the injunction because I do not, for the reasons stated, consider the omission of sufficient weight.
>
> Before concluding my views regarding this part of the case, I consider it desirable to briefly state the current attitude of the courts when dealing with applications for discharge of ex parte orders on the ground of non-disclosure. It is succinctly set out in the following passage in the judgment of Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd*:
>
> > 'I will deal first with the application to set aside the ex parte order. It is a basic principle, applicable to all ex parte applications, that a plaintiff seeking ex parte relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the ex parte injunction on that ground alone. *But if, in the circumstances existing when the matter comes before the court inter-partes, justice requires an order either continuing the ex parte injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure*. Moreover, there is authority that, contrary to the *law as it was originally laid down, there is no absolute right to have an ex parte order obtained without due disclosure set aside: there is a discretion in the court whether to do so or not*.' (Emphasis added.)

From the aforesaid cases, it cannot be denied that the court has an overriding discretion whether or not to set aside an ex parte order obtained without due disclosure, but as is implicit, it must be founded on judicial principles which invariably necessitates the court to evaluate, inter alia, the materiality and importance of the non-disclosure.

The importance and materiality of any fact is a question of fact to be decided by the court and the exercise of the court's discretion can only be embarked upon if the applicant has made frank and full disclosure of all material facts — that was the principle established by the Supreme Court in *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153. His Lordship Mohamed Azmi SCJ at p 155 stated the principle as follows:

> Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, *it is incumbent on the applicant to make frank and full disclosures of all material facts*. Every material representation must not be misleading, and there must not be any suppression of material facts. *Failure to do so at the crucial time of making the ex parte application would invariably be fatal*. On this particular point we approve the judgment of VC George J in *KSM Credit & Leasing Sdn Bhd v Data Mante (M) Sdn Bhd & Ors* [1986] 1 CLJ 500 on the applicability of the principle of frank and full disclosures in all *ex parte* applications for Mareva injunctions.

Thus, from the principles aforesaid, the degree of importance of the facts not disclosed (as determined by the court) is an important factor in the exercise of the court's discretion whether or not to set aside the ex parte order — the higher the degree of importance of the fact not disclosed, the lesser would be the court's discretion in maintaining the injunction.

In any event, with the introduction of O 29 r 1(2B) of the RHC, the need for full and frank disclosure at the ex parte stage has been enshrined in the RHC which invariably fetters the court's discretion.

Support for the fetter on the court's discretion in respect of non-disclosure at the ex parte stage is found in the case of *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] 4 CLJ 726, and I associate myself with the views expressed by Kamalanathan Ratnam J at p 730 thereof, where he stated:

> From these cases and more so from the decision in *Brink's Mat*, it can be gathered that the principles applicable to a non-disclosure case is that the court will first decide whether there was material non-disclosure justifying a setting aside of the ex parte order. As said by Ralph Gibson LJ at p 1356 'the material facts are those which it is material for the judge to know in dealing with the application as made;'. Only then does the discretion arise to nonetheless continue the ex parte injunction or to set it aside and grant a fresh injunction. The discretion to continue the ex parte injunction only arises because there is a discretion to grant a fresh one. In the circumstances, when the need to exercise this discretion arises, it will be governed by whether the non-disclosure was innocent and whether the injunction would have been granted if the non disclosed facts had indeed been disclosed.
>
> However, it is my judgment that this *discretion does not now arise in the light of O 29 r 1(2B) of the RHC*. The effect of this amendment to O 29 is that the court will look purely as to whether there has been a non-disclosure of material facts in line with the decision in *Creative Furnishing*. *The earlier principle that whether in all the facts now before the court including the previously non disclosed facts, the court might be minded to grant the injunction is no longer of relevance. That to my mind, would become relevant only when it comes to the plaintiffs' inter partes application for an interlocutory injunction*. This was the approach I adopted in *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 4 MLJ 77. This is what I said at p 97:
>
> > '… Order 29 r 1(2A) of the RHC 1980 was introduced for a specific purpose and with specific reference to *ex parte* applications. *The need for full and frank disclosure at the ex parte stage has now been enshrined in the rules*. Such rules cannot be treated as mere pedantic verbiage. They must be strictly complied with by the parties and enforced by the court. It is my finding that the plaintiffs had indeed breached this rule.' (Emphasis added.)

In the light of our O 29 r 1(2B) of the RHC, I must express my reservation and doubt, whether the principle established in *Brink's Mat*'s case concerning the discretion point can and should be applied or followed by our courts. The same reasoning would also apply to *Tan Guan Eng*'s case, bearing in mind that the case was decided prior to the introduction of O 29 r 1(2B) of the RHC.

The position as it stands now in respect of the principles applicable concerning disclosure is similar to the position existing in *Siporex Trade SA v Comdel Commodities Ltd*, where the principle was adequately laid out at p 437.

> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. *Such an applicant must show the utmost good faith and disclose his case fully and fairly*. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. *He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application*. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. *If the duty of full and fair disclosure is not observed the court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure*. Most of these principles are established by authorities such as *Rex v The Kensington Income Tax Commissioners* [1971] 1 KB 486; *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289; *Wardle Fabrics Ltd v G Myristis Ltd* [1984] FSR 263; *Bank Mellat v Nikpour* [1985] FSR 87. The other principles have not been the subject of detailed challenge.

Thus, to summarize the position, since the plaintiffs have failed to make a full and frank disclosure at the ex parte stage, they have breached the provisions of O 29 r 1(2B) of the RHC, and the court is accordingly justified in setting aside the injunctive order obtained, which is amply supported by the evidence herein. The evidence adduced clearly shows not only the failure to disclose the 14 July 1991 order at the ex parte stage, but also the disclosure too late in the day of the order dated 3 February 1993 in Saman Pemula No 72 of 1993 — the same being disclosed after the application to set aside the order was made. It is a basic principle of the law of injunctions that fresh evidence which was not before the court at the ex parte stage, cannot be introduced for purposes of the inter partes application to remedy the error made in the ex parte application or to bolster the ex parte order — *Datuk Abu Mansor bin Mohamed Nasir v Bank Kerjasama Rakyat Malaysia Bhd & Anor* [1982] 1 MLJ 258 at p 260.

For the sake of completeness, I would also touch on the plaintiffs' contention that the plaintiffs' application was based and prompted by the first defendant's correspondence with Towry Law exhibited as exh DKD6 and DKD7 in encl 13. In essence, the correspondence relates to the request for release of the sum of US$500,000 by the third plaintiff from Towry Law arising from the appeal court decision made on 27 September 2000 in Originating Summons 1141 of 1997. It is interesting to note that in the reply by Towry Law's solicitors in DKD8, they refused to accommodate the third plaintiff's request unless a court order was obtained. This

refusal was predicated by the earlier consent order in Suit No 22–3863–1998 which subjects Towry Law to hold the monies pending a further order.

By reason of the consent order in Suit 3863–1998 above, not only is there no urgency to move the court ex parte in the manner they did but more importantly their own indolence and lack of vigilance (to put it mildly) in not moving the court for variation of the order or even moving the court for an injunction restraining the release of the funds. The act of moving the ex parte injunction in this court in the face of the consensual freeze order in the KL High Court is causing untold embarrassment for both courts for which this court is unable to excuse.

The conduct of the plaintiffs become all the more grave when they blatantly attempted to ignore their own undertaking given to this court under the consent order dated 17 August 1991 in Suit No 22–195–1991 for the suit to be heard first and the decision binding the action herein.

Non compliance with O 3 r 6 of the RHC and abuse of process

Order 3 r 6 of the RHC reads as follows:

> Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.
>
> A summons on which no order was made is not a proceeding for the purpose of this rule.

It is the defendant's submission that the last proceeding in this action was either when the action was filed, ie on 28 November 1991 or when the consent order in JB High Court Suit No 22–195–1991 was entered on 1 March 1992. In either case, there has been a lapse of more than one year since the last proceeding in this action, and accordingly, the plaintiffs were obliged to give notice of intention to proceed before moving for the ex parte injunction on 17 October 2000. Since the requirement of the rule is mandatory, failure to comply warrants a setting aside or striking off of the action and relies on the case of *China Insurance Co Ltd v Yeong Ah Lam & Anor* [1973] 2 MLJ 185, which was approved by the Court of Appeal in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at pp 286–287.

The plaintiffs' submission on this point is that the rule must be interpreted liberally — the rule cannot apply to Mareva injunctions or Anton Pillar orders because by definition and the requirement of secrecy and speed, you have to go ex parte. The plaintiffs further submit that even if there is a requirement to comply with, non compliance is a mere irregularity and the court has a wide discretion to remedy such an irregularity and relies on the case of *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565.

The word 'must' was held in *Attorney General v Parson* [1956] AC 421 as being imperative which admits no discretion just like the word 'shall'. In

Britannica World Language Edition of the Oxford Dictionary, Vol 1 Pt 1 defines the word 'must' to mean 'expressing necessity; obliged or required to'. *The Concise Oxford Dictionary* (9th Ed) Thumb Index Edition defines the word 'must' to mean 'be obliged, be certain to; ought to; expressing insistence'.

In *Strouds Judicial Dictionary of Words and Phrases* Vol 2 (6th Ed) at p 1653, the word 'must' was defined as follows:

> 'Must be made' (Finance Act 1971 (c 68), s 23(2). As used in this section 'must' is mandatory and not merely directory (word — *Stempt v Griffin* (1988) STC 47).

The requirement in O 18 r 8(1) of the RSC that in any pleading subsequent to a statement of claim, a party 'must' specifically plead any matter showing illegality, is mandatory (*Shell Chemicals UK v Vinamul (formerly Vinyl Products)* (1991) 135 SJ 412.

'Application ... must be made within six weeks' (Housing Act 1974) (cl 44) Sch 8 para 2(3), 'must' is mandatory, so that a tenant who was out of time, and was refused an extension of time by the county court, could not initiate the procedure again by serving a second notice (*Mayhew v Free Grammar School of John Lyon* The Times, 11 June 1991 (CA)).

Upon appraising the definition of the word 'must' as found in the dictionaries aforesaid and the language used by O 3 r 6 of the RHC, it is my considered view that it is mandatory in nature. The word used is 'must' in contradistinction with the word 'may', and hence the mandatory effect and not merely directory — it becomes one of necessity and is obligatory.

In *China Insurance Co Ltd v Yeong Ah Lam & Anor*, his Lordship Syed Othman J (as he then was) set aside the notice of trial given some 23 months after the delivery of defence.

His Lordship, in that case in construing O 64 r 13 of the Rules of the Supreme Court 1957 (which is in pari materia with O 3 r 6 of the present RHC) observed that the non compliance with the rule does not render the proceedings void, and as such does not warrant the striking out of the whole action, but only the notice of trial.

In *Ng Hee Thoong v Public Bank Bhd*, Gopal Sri Ram JCA was of the view that a defendant in defending an application for summary judgment is well within his rights to raise and rely upon the non compliance by the plaintiff of O 3 r 6 of the RHC.

Turning to the case at hand, though I would agree that secrecy and speed is the essence in injunctive relief. Nevertheless, the facts of this case clearly negatives any element of necessity to act with secrecy and speed. The subject matter of the funds over which the restraining order is operative was in no danger of being dissipated or placed in jeopardy by reason of the fact that the consent order of 30 November 1998 made in Suit No 3863–98 had frozen the funds. The first plaintiff was a party to the consent order and accordingly, she knew for a fact that the funds were never in jeopardy so

long as the consent order is not set aside or varied. That being the case, I cannot see any plausible reason for her not to comply with the requirements of O 3 r 6 of the RHC, and hence I am amply justified in concluding that a breach of same in the factual matrix of this case cannot be termed a mere technical non compliance of procedural rules amounting to an irregularity. As was stated by His Lordship Gopal Sri Ram JCA in *Lai Yoke Ngan v Chin Teck Kwee* at p 578:

> It is wrong to assume that the court is obliged in every case to overlook the breach of a rule of court. For that would mean that a litigant may honour the Rules of the High Court more by breach rather than by observance. This is certainly not the law.

In essence, the notice required under O 3 r 6 is to prevent a slumbering plaintiff from taking advantage of his indolence without first giving notice to the defendant. The rationale behind the rule is obvious in that the defendant should not only not be taken by surprise, but also should be given an early opportunity to protect his interest upon notice being given. It is, in short, a rule of essential justice and fairness.

The fact that an ex parte injunction was sought after almost eight years of inactivity and delay is reason enough for the plaintiffs to comply with the mandatory requirements of the rule. The delay here is coupled with abuse of process, the cumulative effect of which takes it out of the ambit of irregularity.

The conduct of the first plaintiff in contumeliously ignoring the undertaking given through the consent order dated 1 March 1992 in JB High Court Civil Suit No 195 of 1991, and initiating multiplicity of proceedings involving the same funds in KL Civil Suit No 3863–1998 and JB High Court OS No 1141 of 1997 can only be described as an abuse of process.

The conduct of the plaintiffs herein is akin to the conduct of the respondent in *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 where the respondent instituted multiplicity of proceedings in respect of the same subject matter in the Penang High Court and Shah Alam High Court. The Court of Appeal in laying down the various circumstances in which the court's process may be abused held that the intrusion by one branch of the High Court into the conduct of proceedings that were plainly within the control and supervision of another branch clearly smacks of abuse.

The Court of Appeal propounded that the circumstances in which the court's process may be abused are varied and numerous and the categories of such cases are not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed.

The Court of Appeal in clear and unambiguous language held that abuse of process would include the use of interlocutory relief as an

instrument of oppression. It is plainly an abuse of the court's process where the relief at law or in equity is used not to remedy a genuine grievance but as an instrument of oppression.)

Again, in *JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312 where there was a duplicity of proceedings in London and Kuala Lumpur over the same subject matter, the court held that it amounted to an abuse of process and stayed the KL proceedings as well as dissolved the injunction granted.

Applying the principles established aforesaid, it is my finding that the conduct of the first plaintiff in instituting several proceedings in both the Johor Bahru and Kuala Lumpur High Court in respect of the same subject matter smacks of one of the worst cases of abuse of process, and by reason thereof, the interlocutory injunction herein cannot be allowed to stand.

Res judicata

The defendant's complaint under this head is that the principles of res judicata prevents the first and second plaintiffs herein from making and obtaining the injunctive order herein as they had earlier failed to obtain an injunctive order in Suit 195 of 1991 to restrain the third plaintiff company, and further the Court of Appeal in OS No 1141 of 1997 had on 22 September 2000 decided on the issue of the first plaintiff having no interest whatsoever in the Towry Law funds. The cumulative effect of the two orders made in the above suits, it is submitted, are final orders on the issue of whether or not the plaintiffs have any say in management matter of the third plaintiff, and as such are final and binding unless and until reversed on appeal, and in support thereof relies on *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; *Tenaga Nasional Bhd v Prorak Sdn Bhd* [2000] 1 MLJ 479.

The plaintiffs, in opposing the res judicata argument, submit that for res judicata to apply, there must be a final judgment — *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536, and if there is no final decision there can be no estoppel — *Schlieske v Minister for Immigration & Ethnic Affairs (G 324 of 1987) Schilieske v Robilliard (G361 of 1987)* (1988) 79 ALR 554. The facts herein do not disclose that there has been a final judgment on any issues here or other related civil suits on issue estoppel as res judicata.

The question of what res judicata is has been appropriately set out in the Supreme Court case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd*, where Peh Swee Chin FCJ at pp 197–198 described it as follows:

> What is res judicata? It simply means a matter adjudged and its significance lies in its effect of creating an estoppel per rem judicatum. *When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words the parties should accept it as the truth; res judicata pro vertitate accipitur. The public*

> *policy of the law is that, it is in the public interest that there should be finality in litigation — interest res publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action — nemo debet bis vexdri pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy. (Emphasis added.)

It is also pertinent to note that the Supreme Court held that there are two kinds of estoppel *per rem* judication — namely, cause of action estoppel and issue estoppel.

The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

From the Supreme Court decision aforesaid, it becomes clear that issue estoppel means an issue which a party is estopped from raising in a subsequent proceeding.

After carefully considering the submissions and authorities preferred by the respective counsels for the first and second plaintiffs and the defendants, I have come to the conclusion that issue estoppel as res judicata applies in this case.

As was aptly put by Shaik Daud Ismail JCA in *Lim Oh & Ors v Allen & Gledhill* [1998] 4 MLJ 645:

> For issue estoppel to apply, it was not necessary for the issue to be decided on its merits. Once a point is distinctly put in issue and determined and a judicial decision is final on that point, then it ought not to be allowed to be ventilated in a fresh or new suit.

Turning to the facts of the case herein, it is my judgment that the order of the Court of Appeal in OS 1141 of 1997, given on 22 September 2000 that the first plaintiff in her capacity as beneficiary of the estate and/or as director of the third plaintiff has no capacity to interfere in matters concerning the management of the third plaintiff, and the earlier court order dated 17 August 1991 in Suit No 195 of 1991, whereby the court refused, inter alia, to restrain the first defendant from managing the assets of the third plaintiff, had adjudicated and disposed of with finality the issue herein of whether or not the plaintiffs have any say in management matters of the third plaintiff.

In the light of my finding of issue estoppel, the plaintiffs' counsel's submission that there must be a final judgment on the issues before res judicata applies must surely fail. As was stated by Lord Guest in *Carl Zeiss Stiftung*'s case at p 565:

> *…in respect of issue estoppel the question is not whether there is a judgment that is final but whether the issue that was adjudicated on was disposed of with finality*. (Emphasis added.)

Though the Federal Court of Australia in *Schlieske*'s case held that if there was only an interlocutory decision both in form and substance, there could be no estoppel. Nevertheless, that case cannot be cited for the proposition that res judicata has no application in every interlocutory decisions. What is of importance is the determination of whether the decision in question was a final one on the merits or the issue in dispute. In point of fact, Beaumount J in *Schlieske*'s case acknowledged that there was no hard and fast rule in the application of res judicata principles in interlocutory decisions when he stated at p 574:

> It is true that, in some case what may appear to be an interlocutory decision is in truth a final one.

Again, the plaintiffs' submission that they are entitled to obtain the relief on the ground of changed circumstances even though the court may have earlier refused or dissolved the injunction based on the decision in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 is untenable for the simple reason that the circumstances have not changed. The first defendant, ever since the institution of Suit No 195–1991 in 1991 was in his capacity as managing director of the third plaintiff in a position to deal with Towry Law's funds on behalf of the third plaintiff, and his status up to date has not changed to necessitate a similar ex parte application nine years later.

As it is, the history of the plaintiffs' conduct of shopping and going from judge to judge is highly improper, but what makes it deplorable is the manner of making the ex parte application herein without even making proper disclosure of the previous unsuccessful applications.

Hence, issue estoppel clearly operates against the first and second plaintiff herein.

Issue of director's duties — whether directors can bring the action.

The first defendant's submission under this head is that in law, the first plaintiff has no locus as director of the third plaintiff to claim interest in the assets of the company and relies on the Supreme Court decision of *Hew Sook Ying v Hiw Tin Hee*'s case.

The first and second plaintiffs, in relying on the case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, contends that as director, the first defendant is a trustee, and since a director can be held accountable if he misapplies the rationale for preservation of the assets of the third plaintiff through the injunction, restraining the first defendant becomes self-evident.

The issue relating to the liability of directors in *Lian Keow*'s case was whether as director he was under a fiduciary duty to exercise his powers and control over the company's affairs in the interests of the company. The complaint against the director in that case was that he acted wrongfully and in breach of his duty as director of the company in procuring the execution of the charge. The Supreme Court in holding that there was a breach of the fiduciary duty owed to the company to act in its best interests adopted the

principle established in *Belmont Finance Corporation v William Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 which principle appeared at p 405 thereof:

> A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties, the directors of a limited company are treated as if they were trustees of those funds of the Company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co* (1894) 1 Ch 616 at pp 631, 638, per Lindley and Kay LJJ). So if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they came into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.

Though the aforesaid case seems to suggest that directors are trustees, nevertheless on a close scrutiny, the trusteeship position arises if they abuse their fiduciary duty by misapplying the company's funds.

There is a stark difference between the fiduciary duty and fiduciary relationship of a director vis-a-vis the company. In the context of the difference aforesaid, a director's fiduciary duty to the company is not tantamount to him being a trustee of the company. Support for the proposition aforesaid is found in the case of *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, where Rommer J had this to say at p 426:

> It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But *if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading*.

Thus, in the context of the present case, the decision in *Lian Keow*'s case is inapplicable. The issue in its proper perspective is whether the first and second plaintiffs can initiate the action herein in their capacity as directors in the face of the various earlier orders of the court dated 3 February 1993 in OS No 72–1993 and 27 September 2000 in OS No 1141 of 1997, which expressly prevents them from bringing the action. Though the injunction may be for the altruistic purpose of preserving the third plaintiff's assets, nevertheless, the ultimate victim would be the third plaintiff company who would invariably be deprived of the utilization of its core funds for its business. In the absence of evidence of malfeasance and/or misapplication of funds, the hands of the officers of the third plaintiff company who are responsible for the management of the company should not be tied to the detriment of the operations of the company.

Thus, by reason of the previous court orders which are still valid and subsisting, the first and second plaintiffs' incapacity is self evident to prevent the plaintiffs from the injunctive relief qua directors.

Having considered the various issues raised aforesaid, I shall now advert to the applicable principles in the approach to be adopted by the courts in

the granting or refusing of interlocutory injunction as laid down by the Court of Appeal decision in *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors* [1995] 1 MLJ 193.

Applying the principle so established, and directing myself in the manner as stated in *Keet Gerald Francis Noel*'s case and evaluating the affidavit evidence and the submissions made by respective counsels, it is my judgment that the first and second plaintiffs have failed to satisfy the three requirements so established by the Court of Appeal.

The question of serious question has been negatived by the consent order dated 1 March 1992 in Suit 195–1991, where in agreeing that the present suit awaits the disposal of the said suit, the plaintiff has acknowledged that there are no serious questions to be tried in this suit as the real or underlying dispute is in Suit 195 of 1991 aforesaid.

Since there are no serious questions to be tried, on that score alone, the injunction herein ought to be set aside and I need not embark upon the second and third stages of inquiry namely where the justice of the case lies and whether damages are an adequate remedy.

Even if I were to embark upon an inquiry as to the balance of convenience and justice, it would still be in the defendant's favour. This is because no matter which way one looks at it, the subject matter of the injunction herein is the core assets of the third plaintiff company, and hence it would be detrimental to the third plaintiff company to be unable to utilize the funds for its business just because of the plaintiffs' apprehension or misapprehension that there may be misapplication of the funds by the defendants. In the absence of cogent evidence (and none exists here) the defendants who are both *de jure* and *de facto* directors of the third plaintiff, as officers of the company, should not have their hands tied in the management of the company and its funds. The balance of justice in the light of my finding of serious abuses of process, material non-disclosure and the operation of the principles of res judicata would clearly tilt in the defendant's favour.

As regards the question on whether damages are an adequate remedy, the subject matter being funds of a quantified sum speaks for itself. It should be observed and emphasized that there is no evidence, and in fact there is no challenge on the defendant's ability to meet any claim for damages. On the contrary, the defendants have challenged the plaintiffs' undertaking as to damages and the failure to provide any evidence of their ability to meet the undertaking gives rise to the question of their credibility to honour the untested and illusory undertaking given.

Taking all the aforesaid consideration in mind, I disallowed the plaintiffs' application in encl 14 in respect of the inter partes injunction with costs and allowed the defendant's application in encl 24 to set aside the injunction obtained ex parte on 17 October 2000, as varied on 25 October 2000 with costs.

The plaintiffs, subsequent to my orders aforesaid, applied orally for an Erinford injunction. I heard oral arguments by both counsel and refused the application.

A The refusal is predicated on the exhaustive deliberation and findings made by me on the various issues raised which does not warrant the status quo to remain pending appeal.

Plaintiffs' application dismissed.

B Reported by Jafisah Jaafar

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